No. 97-1028

In the Supreme Court
of the
United States

OCTOBER TERM, 1997

KAREN LIVADAS

Petitioner,

vs.

LLOYD W. AUBRY, JR.,
IN HIS OFFICIAL CAPACITY AS
LABOR COMMISSIONER
FOR THE STATE OF CALIFORNIA,

Respondent.

On Writ of Certiorari to the
United States Court of Appeals
for the Ninth Circuit

BRIEF FOR THE RESPONDENT ON THE MERITS

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QUESTIONS PRESENTED

1. If a state, which has a strong public policy encouraging arbitration, grants a limited exception to that policy for the purpose of allowing unrepresented workers to avoid mandated arbitration in claims covering certain state wage payment laws, may the state law granting the exception also limit that exception in the event that the employee is employed under the terms of a collective bargaining agreement which contains an arbitration clause?

2. If the answer to question 1 is yes, may the state adopt a test less expansive than that required by federal caselaw for determining the limitations on the state courts or a state agency when entertaining claims by workers employed under the terms of a collective bargaining agreement or must the state apply the tests developed by federal caselaw to enforce § 301 preemption?

3. If the state must utilize the federal § 301 preemption tests to determine its jurisdiction, was the dismissal of Livadas' claim required under those principles?

4. Has a state agency which exercised its discretion in attempting to determine the thin line between state and federal power where a collective bargaining agreement is involved, violated the federal rights of a worker whose wage claim it has rejected and is that violation cognizable under 42 U.S.C. § 1983?

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BRIEF FOR THE RESPONDENT ON THE MERITS

I. INTRODUCTION

A. *Facts*

On January 2, 1990, Karen Livadas, a grocery clerk employed by Safeway Stores, was terminated by her employer. The undisputed facts established in the summary judgment

proceedings in the District court for the Northern District of California revealed that Ms. Livadas requested, and was refused, all pay due her at the time of the discharge. (J.A. 27) Ms. Livadas was told by her manager at Safeway that he did not have payroll records at the store and that he could not provide her with any pay at that time but that Safeway would mail her check to her. Ms. Livadas received her check for final wages on January 5, 1990. (J.A. 14) According to the affidavit of Ms. Livadas, neither she nor Safeway Stores disputed the amount of the final wages she received on January 5, 1990. (J.A. 14)

On January 9, 1990, Ms. Livadas filed a claim with the District Office of the Division of Labor Standards Enforcement[1] in Napa, California. In the claim form, Ms. Livadas explained the issues involved in the claim as follows:

> "I was terminated from employment on 1/2/90. At that time I requested all monies due me to date. Shane Ryan, Mgr, told me 'I can't cut you any money, they will probably mail a check to your house, that's how Safeway does it.' I subsequently did receive the check via mail to my home on 1/5/90. I am claiming penalties from 1/2/90 - 1/5/90." (J.A. 18)

In her original claim Ms. Livadas indicated that the final wages she had received were as follows: 24 hrs. @ $13.78; 125[2] vacation hrs. @ $13.78 for a total of $2112.49.

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[1]The California State Labor Commissioner is the chief officer of the Division of Labor Standards Enforcement (DLSE). The terms Labor Commissioner, Labor Board, and Division of Labor Standards Enforcement are commonly used interchangeably to describe the state agency.

[2]The number of vacation hours on the claim form differs from that Ms. Livadas put in her affidavit filed in the District court. The wages received,

(continued...)

Labor Code § 201 provides that an employee is entitled to receive all earned wages at time of discharge. The willful failure to pay all earned wages at time of discharge pursuant to § 201 may result in the imposition of penalties under the provisions of Labor Code § 203. Livadas sought to recover the § 203 penalties only (J.A. 18).

There is no evidence in the record detailing the investigation conducted by the Napa District Office of the California Labor Commissioner regarding the claim filed by Ms. Livadas. However, it is clear that the information accumulated by the assigned deputy was not based simply on the fact that Ms. Livadas had marked the box "union" on her claim form as alleged by Petitioner[3]. (See Brief For The Petitioner, pp. 3-4) On February 7, 1990, Deputy Labor Commissioner J. Aceves addressed a letter to Ms. Livadas which explained that as a result of the provisions of California Labor Code Section 229, the DLSE would be unable to proceed with her claim. (J.A. 16-17) The letter detailed the facts that the Deputy had as-

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[2](...continued)
according to the affidavit of Ms. Livadas, were in the total amount of $2112.49. This represented 128.5 "days" (she obviously meant "hours") vacation at $13.78 per hour, 24 hours worked in the previous week at $13.78 per hour, plus a 50 cent per hour shift differential for an unknown number of hours. (J.A. 14) The figures, of course, do not compute with the facts given. If the 50 cent shift differential was paid for all of the hours in the previous week, Ms. Livadas should have received $2113.45. While the differences are *de minimis* they do illustrate the problems involved in determining the wages due under the terms of the CBA.

[3]At footnote 3, page 4 of her Brief, Livadas alludes to the fact that counsel for the Division had referred to a copy of the CBA obtained from Livadas' counsel. Without belaboring a legal point which would appear to be evident, Commissioner points out that the sheparding declaration referred to the source of the document simply to allay any objection based on foundation.

sembled to that point and, based on those facts, explained the reasons why the California Law precluded the DLSE from processing Livadas' claim:

> "Labor Code Section 203 requires that the wages continue at the 'same rate' until paid. In order to establish what the 'same rate' was, it is necessary to look to the collective bargaining agreement and 'apply' that agreement. The courts have pointed out that such an application is exactly what the provisions of Labor Code Section 229 prohibit." (J.A. 16)

The collective bargaining agreement under which Livadas was employed provided for at least eight separate job classifications. Detailed contractual definitions of each of these classifications were contained in the CBA. (See note, J.A. at 3) The CBA also provided, among other benefits, for bonus pay (J.A. 13), termination pay[4] (J.A. 2), night premium (J.A. 9), shift differential (J.A. 8), and overtime compensation provisions.

There is no evidence in the record regarding possible defenses to the imposition of penalty wages which may have been available to Safeway Stores. A number of defenses to the willful failure to pay the wages due in a timely manner might rely on subsequent events. For instance, one defense to the imposition of penalty wages would be that the employee was ultimately reinstated with full back pay. However, as explained, *infra*, Commissioner's motion to join Safeway was denied by the District court and any valid defenses which the

[4]The CBA provides (J.A. 2) that if an employee is not given specified notice of termination, the employee must be given the equivalent pay. This pay in lieu of notice provision does not operate, however, if the discharge is for "cause".

employer could have raised are not a part of this record[5].

In addition to the above, the collective bargaining agreement also contained provisions which could require interpretation and or application of the CBA in order to reach the conclusion that the wages were, in fact, "due" or whether the failure to pay the wages was "willful"[6].

Livadas alleged that the largest portion of the sum due to her at time of termination represented vacation wages. The CBA provides that the parties were bound by the terms of the Northern California Retail Clerks Union-Employers Vacation Fund and Plan. (J.A. 11) The provisions of California Labor Code §227.3, which specifically exempt collective bargaining agreements, would preclude the application of the California law and require that the inquiry regarding the vacation wages

[5]Despite the fact that Commissioner was not allowed to join Safeway, the District court's judgment required the Commissioner to pay any penalty Safeway would have been assessed in the event that Safeway raised the defense of the statute of limitations contained in the CBA. It appears now that even Livadas agrees that the District court exceeded its jurisdiction in this regard. (See fn. 20, p. 43 of Petitioner's Brief)

[6]The definition of the term "willful" as it is used in Labor Code § 203, is found at Title 8, California Code of Regulations ("C.C.R."), §13520:

> "A willful failure to pay wages within the meaning of Labor Code Section 203 occurs when an employer intentionally fails to pay wages to an employee when those wages are due. However, a good faith dispute that any wages are due will preclude imposition of waiting time penalties under Section 203.
>
> "a) Good Faith Dispute. A 'good faith dispute' that any wages are due occurs when an employer presents a defense, based in law or fact which, if successful, would preclude any recovery on the part of the employee. The fact that a defense is ultimately unsuccessful will not preclude a finding that a good faith dispute did exist. Defenses presented which, under all the circumstances, are unsupported by any evidence, are unreasonable, or are presented in bad faith, will preclude a finding of a 'good faith dispute'."

be based entirely on the terms of the collective bargaining agreement.

B. *Proceedings Below — The District Court*

On February 16, 1990, Ms. Livadas filed an action in the District court for the Northern District of California for declaratory relief, injunction, and relief under 42 U.S.C. §1983. The Labor Commissioner answered the complaint on March 6, 1990, stating that the decision not to proceed further on Ms. Livadas' claim was based upon the Labor Commissioner's policy. (Answer of Labor Commissioner filed March 6, 1990, p. 4, ¶ 5)

On March 30, 1990, the Commissioner moved the court to join Safeway Stores and Local 373, United Food and Commercial Workers Union, AFL-CIO as additional parties. The motion to join the additional parties was denied by the District court. Possible defenses which Safeway Stores may have been able to raise are not a part of this record.

Cross motions for summary judgment were filed by the parties and on October 12, 1990, Judge Henderson of the District Court granted Livadas' motion for summary judgment. In its decision, the District court addressed both the applicability of 29 U.S.C. §1983 to the issues in this case and the question of the validity of the Labor Commissioner's actions.

The District court concluded that Livadas had "a private right of action under §1983 to bring this case as an individual to vindicate her NLRA rights from interference by the state." (Pet. 32a) The District court conceded that DLSE based its refusal to "prosecute" Karen Livadas' late wage payment on California Labor Code §229. (Pet. 39a) Despite the fact the court recognized the DLSE position, Judge Henderson held:

> "The short answer is that preemption doctrine is a matter of federal, not state law. A primary purpose of preemption doctrine was to maintain a uniform federal labor law doctrine and to protect federal NLRA rights. Insofar as § 229 and the State's interpretation of it in *Howard* goes beyond the limits of federal preemption doctrine, it is invalid. The DLSE must provide the benefit of enforcement of the wage payment statute to all employees unless the federal preemption doctrine *requires* the State to deny enforcement of the wage payment provision to union members working under a CBA." (Pet. 39a)

The District court, in explaining its rationale, stated that:

> "The defendant argues that enforcement of the state provision at issue for employees working under a CBA would be 'inextricably intertwined with consideration of the terms of the labor contract.'"

However, according to the District court, in this case:

> "The simple question of whether the statute was violated can be determined wholly independently from the CBA. Karen Livadas was not paid until three days after her termination. It requires reference only to a calendar, not to the CBA, to determine that the statute was violated and penalties are due."

The District court then held, as a matter of law, that:

> "California Labor Code §§ 201 and 203 establish timely payment of final wages as a minimum term of employment for all workers, just as the statute in *Metropolitan Life*[7] established mental health care as a minimum term of employment in Massachusetts." (Pet. 47a)

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[7]*Metropolitan Life Ins. Co. v. Massachusetts*, 471 U.S. 724 (1985)

Thus, the District court concluded:

> "[t]he state may not deny enforcement of that benefit only to workers who are parties to a CBA with an arbitration clause. *A fortiori*, the State is clearly not preempted from providing this benefit to employees who work under CBA's." (Pet. 47a)

C. *Proceedings Below — The Ninth Circuit*

Judge Rymer, writing for the majority of the Ninth Circuit, determined that the right which Livadas was asserting was not an individual right to bargain with her employer, but that "[t]he right she asserts is simply to be allowed to participate in her union's collective bargaining activity." Consequently, the Ninth Circuit concluded Livadas had a right under the National Labor Relations Act to "engage in collective bargaining, and §1983 therefore provides a remedy for a deprivation of that right." (Pet. 7a)

However, unlike the District court, the Circuit court concluded that the Commissioner's policy, as set forth in the letter to Livadas written on February 7, 1990,

> "[I]s not to enforce any claim that concerns the interpretation or application of any collective bargaining agreement containing an arbitration clause, pursuant to California Labor Code § 229. He [the Commissioner] then interpreted § 229 to preclude enforcement in Livadas' case because deciding her § 203 claim would require applying her collective bargaining agreement, which contains an arbitration clause." (Pet. 8a)

The majority opinion speaks of the contentions made by the Commissioner throughout the proceedings. Judge Rymer recognized that the Commissioner had argued that it was the

state law[8] (§229) upon which the Commissioner relied in refusing to process the claim of Livadas[9]. The Circuit majority further noted that it was the position of the Commissioner that the state law was consistent with the federal principles of preemption and that the Commissioner was not relying upon the doctrine of federal preemption to justify his refusal to process the claim. (Pet. 9a)

The majority held that what Livadas was really challenging was the application of the California rule to her case. The Court concluded:

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[8]Commissioner concedes that the Court's conclusion in the first paragraph on page 10a of the Petition to the effect that the "Commissioner's policy of not enforcing claims that concern the interpretation or application of collective bargaining agreement containing arbitration clauses is thus based on the idea that such enforcement would be preempted by federal law" is not consistent with this view. A fair reading of the statement of the Court on page 9a, however, will reveal that this was not the argument put forth by the Commissioner and, indeed, it was not necessary to raise the question of federal preemption in order to sustain the Commissioner's position. The Commissioner only raised § 301 in response to the position of Livadas that federal law preempted the Commissioner's enforcement policy.

[9]Aside from the statements contained in Petitioner's Brief which are taken out of context and, therefore, misstate the position taken by the Commissioner (see pages 10 and 11 of the Brief of the Petitioner), Livadas fairly bases some of her contentions on the statements of the District court. However, the findings of the District court, to the extent that they allege that the Commissioner based its dismissal of Livadas' claim on federal law, are mistaken. A cursory review of the record will reveal that the Commissioner has consistently taken the position that "Simply stated, DLSE policy is based on its lack of authority under California law to determine 'claims involving any dispute concerning the interpretation or application of any collective bargaining agreement containing [such] an arbitration agreement." (See Commissioner's Points and Authorities in Opposition To Plaintiff's Motion For Summary Judgment And In Support Of Defendant's Counter Motion, p. 4, ll. 7-11)

"Simply because the Commissioner (arguably) erroneously determined that her claim would be preempted does not invalidate the condition he placed on his enforcement." (Pet. 12a)

Judge Kozinski, writing in dissent, viewed the case in substantially the same light as the District court, concluding that a "court could find that the employer did not pay her immediately upon termination—and thus violated the statute—without ever looking at the CBA."

The dissent recognized that under the California law the Labor Commissioner "does have a good bit of discretion whether to press a particular employee's claim" and points out, that the "Commissioner must also resolve an important question of state law: Does the employee have a valid (and enforceable) claim[10]?" (Pet. 16a) According to Judge Kozinski's dissent, had the Commissioner refused to enforce Livadas' claim based upon his finding that the employee does not have a valid claim, "this would have been purely a matter of state law and not the proper subject of a federal action." Judge Kozinski's analysis fails to note, however, that the provisions of Labor Code § 98.3(a) also mandate that the Commissioner exercise his or her discretion to determine whether the claim is "enforceable."

[10]Judge Kozinski cites to Labor Code §98.3 in the paragraph above and is obviously referring to that statute in reference to the discretionary decisions which must be made by the Commissioner. When Judge Kozinski speaks of determining whether the claim is "valid" he is citing to the provisions of Labor Code §98.3(a) which give discretion to the Labor Commissioner to determine if, in his "judgment," the claimant cannot afford counsel and the claim is both "valid and enforceable."

II. ARGUMENT

A. *Summary Of Argument*

The position of the California Labor Commissioner remains unchanged from the outset of this litigation. Generally, California state law requires that parties who have entered into agreements which provide for arbitration must exhaust these arbitration procedures. The provisions of California Labor § 229, a state law of general application, provide an exception[11] to the firmly-established state public policy favoring arbitration. The granting of this exception to that policy in Labor Code § 229 amounts to adoption by the state of a minimum labor standard for, as the legislature recognized, were such an exception not provided, workers employed under contracts containing an arbitration agreement would not be able to bring actions to enforce these wage provisions.

The state has limited the exception to its established public policy of strictly enforcing arbitration agreements to those employees who are in most need of protection from over-reaching employers. The statute is designed so that the exception from mandatory arbitration is not effective in the event the dispute involves the interpretation or application of any collective bargaining agreement which contains an arbitration agreement. The collective bargaining agreement exception to § 229 contained in the second sentence leaves parties engaged in arm's-length negotiations free to fashion their own remedies.

In reviewing Labor Code § 229, the California courts have defined the terms "application" and "interpretation" for

[11]This exception from mandatory arbitration is limited to disputes to enforce the provisions of Labor Code §§ 200-243 which deal generally with the time, place and manner of the payment of wages.

purposes of that section. The state definition of "application" for purposes of § 229 would preclude the Labor Commissioner from applying the wage rate contained in the CBA to determine the wages due. However, as discussed, *infra*, even if the federal definition developed under § 301 preemption principles and urged by Livadas is required to be used by the state, dismissal of this action was still appropriate.

State minimum labor standards such as § 229 escape preemption. Additionally, as the Court held in *Fort Halifax Packing Co. v. Coyne* 482 U.S. 1 (1987), a state has the right to balance the desirability of a particular substantive labor standard against the right of self-determination regarding the terms and conditions of employment. Just as Congress has recognized that *some* minimum standards may be, under certain circumstances, proper subjects of collective bargaining (29 U.S.C. § 207(b)), so too may the state, as a sovereign, choose to allow parties to a collectively bargained agreement to negotiate as to certain minimum labor standards which are not subject to negotiation by non-represented employees.

As this Court has consistently held, a state law is presumed to be valid and absent explicit evidence that it burdens federal rights, it must be held non-preempted. *Belknap v. Hale*, 463 U.S. 491, 501 (1983). Section 229 is certainly not inconsistent with the federal policy underlying the National Labor Relations Act encouraging arbitration and there has been no logical argument made in these proceedings which would lead to the conclusion that the statute directly interferes with the collective bargaining process.

Further, even if this Court were to conclude that the California law which the Labor Commissioner enforced did violate Ms. Livadas' federally protected rights, such state action in determining the fine line between federal and state power does not state a cause of action under 42 U.S.C. § 1983.

B. *Finding That State Law Is Preempted Requires Analysis Of The Intent Of Congress And Effect Of The State's Regulation On The Federal Statutory Scheme*

In reviewing cases under the preemption doctrine, this Court has "consistently emphasized that the first and fundamental inquiry in any pre-emption analysis is whether Congress intended to displace state law, and where a congressional statute does not expressly declare that state law is to be preempted, and where there is no actual conflict between what federal law and state law prescribe...have required that there be evidence of a congressional intent to pre-empt the specific field covered by the state law." *Wardair Canada, Inc. v. Florida Dept. of Revenue*, 479 U.S. 1, 6 (1986). If Congress has explicitly mandated preemption, the Court's job is easy. *Shaw v. Delta Air Lines, Inc.*, 462 U.S. 218, 230 (1983).

Preemption may also be found when there is outright or actual conflict between federal and state law, *Free v. Bland*, 369 U.S. 663 (1962), where compliance with both federal and state law is in effect physically impossible, *Florida Lime & Avocado Growers, Inc. v. Paul*, 373 U.S. 132 (1963), where Congress has legislated comprehensively, thus occupying an entire field of regulation and leaving no room for the States to supplement federal law, *Rice v. Santa Fe Elevator Corp.*, 331 U.S. 218 (1947), or where the state law stands as an obstacle to the accomplishment and execution of the full objectives of Congress. *Hines v. Davidowitz*, 312 U.S. 52 (1941).

As will be discussed in detail, *infra*, the Commissioner submits that the state law which was the basis for the dismissal of Livadas' claim (§ 229) is a minimal labor standard which initially provides California workers with protection from employer imposed arbitration and limits that protection to those workers which the legislature has determined are in most need of such protection. Absent the provisions of Labor

Code § 229, any employee working under the provisions of an employment contract containing an arbitration clause would be precluded from bringing an action in court or a complaint before the Labor Commissioner.

It is well-established that the NLRA does not protect the right of a worker or his employer to a particular result when negotiating an agreement; the Act simply guarantees the right to "reach such an agreement fairly." *Metropolitan Life Ins. Co. v. Massachusetts*, 471 U.S. 724, 752. California law does not interfere with the bargaining process in any way but, in fact, encourages the parties to bargain free of state intrusion into these areas. Certainly, under the California law, the employee may complain that the limitations of section 229 preclude the bringing of certain actions before the Labor Commissioner if the employment is subject to a CBA with an arbitration agreement; but all minimum labor standards involve some limitation of the parties' rights.

The State of California, in adopting § 229, has made a conscious decision to protect the interests of those workers who most need the protection, while allowing the parties involved in arm's-length negotiations to provide their own remedies. This legislative decision reflects the finding that (1) represented employees working under the terms of a CBA containing an arbitration clause have less need for the protections afforded by sections 200 through 243 of the Labor Code, and (2) that the strong public policy of the State of California in favor of arbitration should be fully implemented in situations where parties of equal bargaining power have so chosen. These legislative conclusions do not preclude the parties from negotiating to provide a remedy within the CBA which would allow the chosen arbitrator to decide these issues of state law. Nor does § 229 preclude the parties from negotiating their own versions of the protective Labor Code

sections if they so desire. In the alternative, the parties may wish to bargain for a CBA which does not contain an arbitration clause leaving the resolution of disputes to the courts and, of course, to the Labor Commissioner. However, failing an agreement, the "backdrop of state law" remains intact.

What either of the parties may obtain in return for one or the other of these alternatives in the way of concessions from the other party is the very nub of the collective bargaining process. It is this very process which California law allows to flourish.

1. *The NLRA Contains No Explicit Congressional Mandate Requiring Preemption Of Section 229*

The provisions of the National Labor Relations Act involved in this case neither contain explicit pre-emptive language nor otherwise indicate a Congressional intent to usurp the entire field of labor-management relations. As the Court has noted on more than one occasion, "The national... Act...leaves much to the states, though Congress has refrained from telling us how much." *Brown v. Hotel & Restaurant Employees*, 468 U.S. 491, 501 (1984).

The Solicitor General of the United States appearing as *amicus curiae*, suggests that the Court should review this case under the most careful scrutiny provided in *Brown v. Hotel & Restaurant Employees*. However, the facts and the issues raised in the *Brown* line of cases[12] are easily distinguishable and such strict review is not merited.

The Court in this case is not faced with the situation in

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[12]*Hill v. Florida*, 325 U.S. 538 (1945) and *Nash v. Florida Industrial Commission*, 389 U.S. 235 (1967).

Nash v. Florida Industrial Commission, supra, 389 U.S. 235, where the Florida interpretation of its unemployment insurance law threatened withdrawal of benefits simply because a unionized employee filed an unfair labor practice charge against his or her employer. The reaction by the State of Florida was a direct and obvious interference with a right of any employee to bring charges of unfair labor practices to the National Labor Relations Board. Nor is the Court faced with the even more onerous state restrictions found in *Hill v. Florida, supra*, 325 U.S. 538, which required licensing of union officials and thus directly interfered with the process whereby the employees chose their representatives.

While one may sympathize with the position of the State of New Jersey in *Brown, supra*, the requirement that the unions file annual statements and imposition of qualification criteria on officials of those unions was a direct affront to the principles of free choice of bargaining agent. The rejection by the Court of the "balancing test" applied to those state laws which fall within the so-called "local interests" exception to the preemption doctrine was required by the facts and the issues raised. *Brown, supra*, 468 U.S. at 502. But, in this case, neither Livadas nor any of the *amicus* in support of her position can point to any violation of an *actual federal protection* in this case.

None of the state laws (or interpretations of state law) outlined in the cases above could conceivably be viewed as anything other than an exercise of power inconsistent with the basic premise underlying the National Labor Relations Act. Each of the state laws in the cases cited by the United States, in effect, "retard, impede, burden, or...control, the operations of the constitutional laws enacted by Congress." *McCulloch v. Maryland*, 4 Wheat. 316, 436 (1819)

Unlike the state law in the cases of *Brown* or *Hill* or

Nash, supra, the California law at issue here (§ 229) does not impact on the rights of parties to bargain to any greater degree than any other minimum labor standard adopted by a state. The provisions of Labor Code § 229 not only allow the parties to the collective bargaining agreement to freely negotiate but encourage such negotiations by protecting the ultimate agreement from state law intrusion.

2. *Labor Code § 229 Was Designed To Protect California Workers Likely To Be Exploited By Employers As A Result Of An Unfair Bargaining Position*

There is nothing in the decisions of this Court which would support the position taken by the United States in its Brief in Support of Certiorari that since an employer may not deny an employee a benefit to which she is otherwise entitled, a state cannot do so. Common sense would dictate that the state is not in the same position as an employer. The state, "by its grace" may grant a protection to any group it finds needs such protection while withholding that protection from another group. So long as there exists a rational basis for such "disparate" treatment, the action of the state does not offend the Constitution.

It would make little sense to allow the state, as the sovereign, the opportunity to adopt minimum standards to address particular evils, but so restrict the state legislature that the minimum standard may not be limited specifically to the evil to which it is addressed.

The public policy of the State of California is to encourage arbitration; not simply arbitration within the employment context—but all disputes between parties. *Moncharsh v. Heily & Blase* (1992) 3 Cal.4th 1, 9; 10 Cal.Rptr.2d 183, 186; 832 P.2d 899, 902. The first sentence of Labor Code § 229

provides a very limited exception to this public policy. The provisions of California Labor Code § 229 have been addressed by this Honorable Court on more than one occasion. Justice Blackmun, writing for a unanimous Court in the case of *Merrill Lynch, Pierce, Fenner & Smith, Inc. v. Ware*, 414 U.S. 117 (1974), observed:

> "By the addition of § 229 to its Labor Code in 1959 California codified for the wage earner, with the solitary-collective bargaining agreement exception, a right of action to recover due and unpaid wages from his employer, regardless of the existence of any private agreement to arbitrate. [citations omitted] This was due, apparently, to the legislature's desire to protect the worker from the exploitative employer who would demand that a prospective employee sign away in advance his right to resort to the judicial system for redress of an employment grievance. The statute's legislative history is sparse, but the exception carved out for collective-bargaining disputes provides the obvious conclusion that it was the individual, nonunion, and otherwise unprotected[13] wage earner who was the intended beneficiary of the State's grace in providing this remedy." *Id.*, at 131.

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[13]Recently, the Ninth Circuit Court of Appeals in the case of *McCollum v. Roberts*, ___ F.2d ____, No. 91-35977 (9th Cir.1994) held that an Oregon law requiring paid rest periods which granted an exception to those employed under the terms of a CBA was preempted. The *McCollum* court, relying on Judge Kozinski's dissent in *Livadas v. Aubry*, noted that "[i]f Oregon's exclusion of unionized employees serves some other legitimate state function, then an argument can be made that its regulations could be justified." Commissioner submits that Labor Code § 229 does serve the legitimate state function of providing protection for those of its workers who are unrepresented, while providing the parties to collective bargaining agreements containing arbitration clauses the benefit of their bargain.

In summarizing the Court's decision, Justice Blackmun concluded that:

> "In the area of regulation that we are considering here, California has manifested a strong policy of protecting its wage earners from what it regards as undesirable economic pressures affecting the employment relationship. This policy prevails in the absence of interference with the federal regulatory scheme."

As Justice Blackmun explained, in the first sentence of section 229, the California legislature has created a right for workers to bring actions to recover unpaid wages irrespective of the fact that the worker's employment contract may contain a binding arbitration agreement; and, in the second sentence of the same statute, limited that right. In addition, as this Court has recognized, there exists a rational basis for the actions taken by the state in balancing the needs of its citizens—a valid exercise of the state's police power.

However, the California legislature, in carving out the limited exception to the stated public policy encouraging arbitration, did not, as Livadas argues, so limit the remedial language of section 229 that it is directed solely to matters of union representation. The provisions of the section only apply if (1) there is a collective bargaining agreement containing an arbitration clause, and (2) the resolution of the dispute requires the *interpretation or application of the collective bargaining agreement*.

Though the Commissioner contends that given the legitimate state function which is the recognized basis for the statutory scheme, the State of California could adopt an exception to its minimum labor standard which specifically applied only to workers employed under the terms of a collective bargaining agreement, the provisions of § 229 are not

so designed. The language of the second sentence of § 229 is not a broad exception which applies to all unionized workers; nor does it even apply to all unionized workers who are employed under the terms of a CBA, nor even to all unionized workers who are employed under the terms of CBA which contains an arbitration clause. The exception contained in the second sentence of Labor Code §229 only applies where the dispute concerns the *interpretation* or *application* of a collective bargaining agreement which contains an arbitration clause.

This Court has already addressed the reasons the state adopted this policy and provided the distinction between the first and second sentences of §229: It was based upon the "obvious conclusion that it was the individual, nonunion, and otherwise unprotected wage earner who was the intended beneficiary of the State's grace in providing this remedy." *Ware, supra*, at 131. The statute is designed to specifically address an evil: The threat of an "exploitative employer who would demand that a prospective employee sign away in advance his right to resort to the judicial system for redress of an employment grievance." This threat is not present in those cases where the employee is represented by a union and covered by the terms of a collective bargaining agreement. Rather, the California legislature concluded, in such cases the parties should be left free to negotiate.

Thus, as the California courts have determined, the plain language of the statute precludes the Labor Commissioner from entertaining claims such as that filed by Livadas.

In addition, as discussed *infra*, the legislature could have presumed that the parties may wish to negotiate the "benefits", the claim for which the individual employee may be precluded from presenting to the Labor Commissioner or the California courts.

3. *Provisions Of California Labor Code Section 229 Reflect State Minimal Labor Standards Which Are Consistent With The Principles Of Federal Law*

Labor Code § 229 is, at one and the same time, both a minimal labor standard and an exception to that minimal labor standard. The first sentence of section 229 provides a right to workers to bring actions in the California courts to enforce the provisions of Labor Code §§ 200 through 243[14] notwithstanding the existence of a private agreement to arbitrate between the worker and the employer. Remedial in nature, the statute has the effect of nullifying the terms of any private employment agreement requiring arbitration if the dispute concerns those Code sections.

The second sentence of Labor Code § 229 constitutes an exception to the remedial provisions of the first sentence limiting enforcement of "any dispute concerning the interpretation or application of any collective bargaining agreement containing such an arbitration agreement.[15]" This statement of state policy is entirely consistent with the provisions of federal law in the area of collective bargaining.

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[14]Section 229 confers upon the individual the right to bring an action to enforce the provisions of this "article" (Article 1 of Chapter 1, Part 1, Division 2 of the California Labor Code).

[15]The order of the Superior Court for the County of Santa Clara entered after remand from the Appellate Court in *Howard*, provides, *inter alia*:

> "State Labor Commissioner Robert E. Howard and Deputy Labor Commissioner Malvern Mayo, and their agents and representatives, are prohibited from enforcing or attempting to enforce any claim for wages involving a dispute concerning the interpretation or application of any collective bargaining agreement containing an arbitration provision..." (Exhibit 'B' attached to declaration of H. Thomas Cadell, Jr., filed in District court in support of motion to join additional parties)

As this Honorable Court held in *Metropolitan Life Ins. Co. v. Massachusetts*, 471 U.S. 724, 727, "When a state law establishes a minimal employment standard not inconsistent with the general legislative goals of the NLRA, it conflicts with none of the purposes of the Act."

The decision of the California District Court of Appeal in the case of *Plumbing, Heating & Pipe Council of Northern California v. Howard* (1975) 53 Cal.App.3d 828; 126 Cal. Rptr. 406, details the state policy and points out that § 229 clearly precludes the Labor Commissioner from processing any dispute which requires the interpretation or application of the terms of a CBA containing an arbitration clause. It is this state-mandated policy to which the Labor Commissioner adheres and it was the application of the test dictated by this policy which led the Labor Commissioner to dismiss Ms. Livadas' claim.

Thus, it is the California state law, as announced by the California courts, which the Labor Commissioner utilizes in making its determinations in this area. The court in *Plumbing, Heating & Pipe Council of Northern California v. Howard, supra*, 53 Cal.App.3d 828; 126 Cal.Rptr. 406, explained the state law in this area:

> "The circumstances of the case at bench involve a dispute concerning the application of a collective bargaining agreement. Appellants assert that Craig's wage claim is covered by the Local 444 agreement, while Craig contends that the Local 393 agreement should control. As the Supreme Court stated in the case of *Posner v. Grunwald-Marx, Inc.* [(1961) 56 Cal.2d 169] at page 181: 'Any controversy under a collective bargaining contract which requires first a determination that the contract does or does not define the rights or duties of the parties in an existing situation is subject to arbitration if the agreement

> provides for the arbitration of disputes that arise out of the contract.' Furthermore, the facts of this case also involve the interpretation of a collective bargaining agreement. If it is determined that the Local 393 agreement is applicable, it will be necessary to interpret the provisions of that agreement to determine whether a foreman is required on a job involving fewer than three journeymen and apprentices." (Underlined emphasis added)

As the *Howard* court decision illustrates, the California state courts define the state law so as to preclude the *application* of the terms of the CBA to the dispute. This interpretation of the state minimum standard by the state court would mandate that under the state law, the trier of fact may not "apply" any of the provisions of the CBA to the dispute where the CBA contains an arbitration agreement.

For purposes of measuring whether a state-law cause of action is preempted by § 301 this Court, in *Lingle v. Norge Division of Magic Chef, Inc.*, 486 U.S. 399 (1988), held that "an application of state law is preempted by § 301...only if such application requires the interpretation of a collective-bargaining agreement[16]." The permissive language employed by the Court in *Lingle* at 413, fn. 12, appears to sanction application of the agreement's rate of pay and other economic conditions to determine damages in those situations where the state law is not preempted and the "worker has prevailed in a state-law suit." The *Lingle* Court did not address the situation where, as here, the state law precludes application of the

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[16]As discussed, *infra*, even if the criteria used by the Court to test the preemptive effect of the federal statute were to be used, the fact in this case would require that the Labor Commissioner must interpret the provisions of Livadas' collective bargaining agreement in order to enforce the state law penalty remedy available at Labor Code § 203.

terms of the collective bargaining agreement to any dispute.

Additionally, the *Lingle* Court's *dictum* in footnote 12 did not impose any duty upon a state to apply the terms of the CBA to its state law claims; the language is permissive, not mandatory and, as is evident by the language the Court employed, it was only the limited right of a state court to determine damages by applying the terms of the CBA which was discussed; but even this right was severely limited by the admonition that "federal law would govern the interpretation of the agreement to determine the proper damages."

4. *The Limitation Placed In The Second Sentence Of Labor Code § 229 Requiring Arbitration Reflects Both State And Federal Policy*

There can be no question of the intent of Congress in regard to the role of arbitration of disputes arising under the terms of collective bargaining agreements. Since the Steelworkers Trilogy this Court has made it abundantly clear that the provisions of the Labor Management Relations Act of 1947, 29 U.S.C. § 173(d), were meant to effectuate a policy that "the means chosen by the parties for settlement of their differences under a collective bargaining agreement is [to] be given full play." *United Steelworkers of America v. American Manufacturing Co.*, 363 U.S. 564, 566 (1960) The language of section 173(d) provides, in part:

> "Final adjustment by a method agreed upon by the parties is hereby declared to be the desirable method for settlement of grievance disputes arising over the *application* or *interpretation* of an existing collective bargaining agreement..." (Emphasis added)

This Congressional mandate can be carried into effect most effectively only if the intent of the parties to collective

bargaining can be guaranteed. Where, as here, the parties have indicated that the question of arbitrability of disputes is to be resolved by the arbitrator (J.A. 11), the intrusion into this process by a state agency would truly be an interference with the collective bargaining process.

Indeed, this Court held in one of the companion cases in the Trilogy that "arbitration of labor disputes under collective bargaining agreements is part and parcel of the collective bargaining process itself." *United Steelworkers of America v. Warrior and Gulf Navigation Co.*, 363 U.S. 574, 578 (1960). The provisions of Labor Code § 229 which preclude the adjudication of any dispute concerning the interpretation or application of a collective bargaining agreement are not in conflict with federal law. As this Court stated in *Fort Halifax Packing Co. v. Coyne* 482 U.S. 1 (1987):

> "When a state law establishes a minimal employment standard not inconsistent with the general legislative goals of the NLRA, it conflicts with none of the purposes of the Act."

The *Fort Halifax* Court further noted: "It is true that the Maine statute gives employees something for which they otherwise might have to bargain. That is true, however, with regard to any state law that substantively regulates employment conditions. Both employers and employees come to the bargaining table with rights under state law that form a 'backdrop' for their negotiations." *Fort Halifax Packing Co. v. Coyne, supra*, 482 U.S. at 21. As in *Fort Halifax*, where the State of Maine provided an exception to the state-imposed severance pay where the "employee is covered by an express contract providing for severance pay"[17], here the State of

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[17] *Fort Halifax Packing Co., Inc. v. Coyne, supra*, 482 U.S. at 4, fn. 2.

California has provided access to the State Labor Commissioner and the California courts except where the worker is employed under the terms of a CBA which contains an arbitration agreement and the claim presented involves a dispute concerning the "interpretation or application" of the CBA. An even more limited exception.

AFL-CIO argues on behalf of Livadas that she has been denied her right to collectively bargain by the Labor Commissioner's policy, because the policy is only effective if there is a CBA and thus, is not a minimum standard. Actually, this argument is the same one presented by Fort Halifax Packing Company: "The statute at issue [here Labor Code § 229] is optional since it applies only in the absence of a collective bargaining agreement containing an arbitration clause and, therefore, cannot be regarded as establishing a genuine minimum labor standard." This argument was dismissed, without dissent, by the *Fort Halifax* Court and, for the same reasons, should be rejected in this case:

> "The fact that the parties are free to devise their own ...arrangement, however, strengthens the case that the statute works no intrusion on collective bargaining. Maine has sought to balance the desirability of a particular substantive labor standard against the right of self-determination regarding the terms and conditions of employment. *If a statute that permits* no *collective bargaining on a subject escapes NLRA pre-emption...surely one that permits such bargaining cannot be pre-empted." Fort Halifax Packing Co., supra,* 482 U.S. at 22 (Emphasis added)

It should follow, *a fortiori*, that an enforcement policy based upon a state law that does not conflict with federal law or policy and permits bargaining may not be viewed as violative of the rights which Livadas claims. It would test common sense to conclude that a state law which recognizes

and encourages the rights of the parties involved in a collective bargaining relationship to freely negotiate the terms and conditions of employment constitutes an infringement on the right of a union member to freely bargain.

C. *Both Livadas And The Solicitor General Err Regarding Effect Of California Law On The Bargaining Process*

The Petitioner and her *Amici*, the United States, contend that (1) the states are forbidden to enforce a law which would deny an employee a "benefit" to which she would be otherwise entitled because the employee is covered by a collective bargaining agreement; (2) the reason the Labor Commissioner refused to prosecute Livadas' claim was "simply because she was covered by a collective bargaining agreement with an arbitration provision[18]", and (3) since the Labor Commissioner's policy is "neither required nor permitted under federal law", the policy undermines employees' federally guaranteed rights to bargain collectively.

Livadas' contention, bottom line, is that the preemption doctrine used by the Court to prevent a state from adopting laws which would lead to entanglement with the collective bargaining process and thus interfere with the federal process must be turned on its head to require that the state law must require that state agencies and courts interpret and/or apply

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[18]Petitioner cites to the language in Commissioner's Brief In Reply To Brief For The United States as *Amicus Curiae* and contends that the statements made there are a concession. Far from it. Commissioner recognizes that a state law that, without rationale or reason, discriminates against a group of workers simply because the workers have exercised their right to collectively bargain would be preempted. But, as Judge Kozinski recognized in his dissent, if the state law serves some other legitimate state purpose a burden on the collective bargaining procedure is permissible.

the terms of a CBA despite a specific state law which prevents such interpretation or application.

The contentions of Livadas and the United States are flawed. In fact, the state does not share the position of the employer and an analogy based upon that premise is totally incorrect. Obviously, it is the state's duty is to protect the interests of its citizens and, through its police power, may adopt and enforce any laws not inconsistent with the federalist system to that end. Therefore, the state may "grant" a benefit to those of its citizens in need of that benefit and, at the same time, limit the application of that benefit in such a way that the evil that the "benefit" is designed to cure is addressed specifically, while preserving the general application of the law to other circumstances.

State legislatures have historically exercised the broad power to make classifications among their citizens as long as the classification exhibits some rational basis. As this Court held many years ago in addressing the right of the states to draw distinctions between classes of workers: "The Legislature is free to recognize degrees of harm and it may confine its restrictions to those classes of cases where the need is deemed the clearest." *West Coast Hotel Co. v. Parrish*, 300 U.S. 379, 400 (1937) (Internal quotation marks omitted)

Again, as discussed above, the contention of the Petitioner and that of the United States to the effect that the Labor Commissioner refused to prosecute Livadas' claim "simply" because her employment was covered by a CBA containing an arbitration clause is a misstatement of the facts in this case. As the Circuit court clearly found, the Labor Commissioner refused to prosecute the claim based upon the fact that the resolution would require the application and interpretation of the CBA in violation of state law. Nevertheless, the Commissioner contends, the State of California

could distinguish the need for its protection based upon the fact that the worker was or was not employed under the terms of a collective bargaining agreement.

Finally, the contention that the policy of the Labor Commissioner is invalid because it is "neither required nor permitted under federal law" is simply not supported by the applicable law or the cases cited. The parties can point to no authority which holds that a state law which is consistent with federal law is preempted simply *because* it is consistent with federal law but is not required by that law. The law, in fact, is to the contrary; if, in fact, the state law is consistent with the federal scheme, there must be a showing that the application of the state law directly impedes the federal scheme. As detailed, *infra*, such a showing is not made.

1. *The State Has The Right To Adopt Minimum Labor Standards And The Concomitant Right To Limit Those Standards*

Livad as and her *amici* take the position that the state may not limit the right of non-represented employees and their employers to bargain regarding the imposition of an arbitration agreement while, at the same time, reserving to parties in a collective bargaining setting the right to negotiate freely. Insisting that the parties arbitrate their disputes is, according to Livadas, a form of invidious discrimination against employees covered by the terms of a collective bargaining agreement containing an arbitration clause. This position turns the concept of disparate treatment on its head.

Since this Court's landmark ruling in *Metropolitan Life Insurance Co. v. Massachusetts, supra*, there can no longer be any question tha. .he states have the right to adopt minimum labor standards which will be unpreempted by the provisions

of the National Labor Relations Act. *Metropolitan Life, supra,* 471 U.S. at 755. Usually, these "minimum standards" apply to all workers within the state, but as this Court noted in *Lingle v. Norge Division of Magic Chef, Inc.*, 486 U.S. 399 at 408, fn. 7 (1987):

> "While it may be true that most state laws that are not preempted by § 301 will grant nonnegotiable rights that are shared by all state workers, we note that neither condition ensures nonpreemption... a law could cover only unionized workers but remain unpreempted if no collective-bargaining agreement interpretation was needed to resolve claims brought thereunder." (Emphasis added)

A state law which distinguishes between represented and non-represented employees is not, *per se* disparate treatment. As this Court held in *Fort Halifax Packing v. Coyne, supra,* "Both employers and employees come to the bargaining table with rights under state law that form a 'backdrop' for their negotiations." *Id.*, at 21. The collective bargaining concept which the NLRA protects, results in "give and take" on both sides of the table. The parties, aware of the provisions of the California law, may negotiate in view of that law.

The line of cases following *Golden State Transit v. City of L.A.*, 493 U.S. 103 (1989) are based upon *Machinists* preemption principles disallowing any state law which intrudes in an area of employer-employee relationship which Congress intended to be left wholly unregulated. If the principles announced in *Golden State* are extended to include any state law which "distinguishes" between represented and non-represented workers because, as Livadas and her *amici* argue, such differentiation *per se* impacts the worker's choice to be represented, the discretion of the state legislature to balance the needs of its citizens will be severely dilluted.

There exists legislation in California, for example, which prohibits the employment of workers in mines and smelters in excess of eight hours in any one day but, allows parties to collective bargaining agreements to negotiate a workday of up to twelve hours in a day[19]. Another, more recent enactment, permits parties to a collective bargaining agreement to negotiate for an alternate dispute resolution of workers' compensation claims thus bypassing the currently overloaded state workers' compensation hearing procedures[20]. In both of these cases the California legislature recognized that parties bargaining in arm's-length negotiations are better able to "frame their terms and conditions of employment to meet their particular needs" (See, Brief of AFL-CIO as *amicus curiae* in 86-341, *Ft. Halifax Packing v. Coyne* cited *infra*) than is the legislature. The assumption is that protections afforded by the collective bargaining process will insure that the interests of the worker will be safeguarded.

Section 229 at issue here does not "alter the economic balance between labor and management" (See *New York Telephone Co. v. New York Labor Dept.*, 440 U.S. 519, 532 (1979)), it, in fact, affects no economic interest and simply affords the parties the opportunity to negotiate against the "backdrop" of the valid state law. There is no showing that the State of California's strong public policy encouraging both collective bargaining and arbitration (*Plumbing, Heating & Pipe Council of Northern California v. Howard, supra,* 53 Cal.App.3d 828, 833-834; 126 Cal.Rptr. 406) is inimical to the federal policy nor that the provisions of § 229, adopted to further that public policy, interfere in any way with the right of workers to organize and collectively bargain.

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[19]Labor Code §§ 750 and 750.5.

[20]Labor Code § 3201.5.

The *amicus* brief of the American Federation of Labor-Congress of Industrial Organizations filed in support of the position of Livadas, while reaching a conclusion we believe is erroneous, addresses the issue faced by this Court and its ramifications in an intellectually honest discussion. The AFL-CIO recognizes the problems this case presents to working men and women represented by unions and covered by CBAs.

Being familiar with the briefs the AFL-CIO has filed in this Court in the past, Commissioner finds it difficult to understand how that organization does not agree with the State of California that the freedom to contract is of vital importance to the protection of the collective bargaining process and, in fact, should be the overriding concern of the Court. To paraphrase what the labor organization so eloquently stated as *amicus* in *Fort Halifax*:

> "Appellant [Livadas] contends...that [California] somehow ran afoul of the national labor policy by determining that rather than dictating a single policy applicable to all employers and employees, the state would allow employers and employees, union or nonunion, to contract out of the state-set [minimum labor standards found at Labor Code §§ 200-243]. Clearly, such a system has a less intrusive impact upon the bargaining process than a system of labor protections that does not permit waivers...Because the parties are 'permitted to set...a lower benefit level than that mandated by state law' (citing *Metropolitan Life*, 471 U.S. at 751), the parties have more room to frame their terms and conditions of employment to meet their particular needs than if only bargaining up is permitted." Brief of AFL-CIO as *amicus curiae* in 86-341, *Ft. Halifax Packing v. Coyne.*

No doubt, then, AFL-CIO found it difficult to distinguish this case from that of *Ft. Halifax* and that would explain the

statement of the *amicus* AFL-CIO in their brief at page 29 to the effect that "[f]or present purposes it is enough to note that as applied, Cal.Code § 229 has not been and cannot be defended on this or any other similar ground. The provision does *not* allow unionized workers collectively to decide to opt out of California's wage laws in preference to some other collectively bargained arrangement."

The argument which the AFL-CIO presented to this Court in *Ft. Halifax* didn't speak of the right to "opt in" or "opt out"; and this Court, in adopting the rationale suggested by the labor organization, discussed the concept only in terms of whether the parties should be free to "frame their terms and conditions of employment to meet their particular needs." Nevertheless, the AFL-CIO identifies a legitimate concern for, in fact, the federal laws which permit an exception from the overtime requirements for those employed under the terms of a collective bargaining agreement are couched in terms of an option. (See, 29 U.S.C. §§ 203(*o*), 207(b)(1) and (2) and discussion regarding Congressional intent, *infra*) Thus, the argument could be made that Congress would require the state provide an option. In this case, the state law does provide an option. Any workers employed under the terms of a CBA may collectively decide to opt out of the state imposed minimum standards contained in § 229.

This choice is not analogous to the allegory offered at page 29 of the *amicus* brief by the AFL-CIO regarding Mr. Hobson's choices. Here the workers' bargaining agent may choose the white horse (arbitration); or the black horse (no arbitration), or the bay (design their own minimum standards and remedies within the collective bargaining agreement); they need not take the horse closest to the door.

2. *The Limiting Of Remedial Legislation To Workers Who Are Not Protected By Collective Bargaining Is Commonplace And, In Fact, Endorsed By Congress*

The state, as sovereign, should be in the position to implement remedial legislation as it deems necessary, choose the class of individuals the legislation will protect, and so limit the legislation that it is directed to the specific evil. California's Labor Code § 229 is one of many state statutes which grant benefits to workers and then limit that benefit to those who are not covered by collective bargaining agreements. In California alone there are a number of such statutes or regulations concerning wages, hours and working conditions. There are, at the same time, a number of state minimum labor standards in California which do not offer an opportunity to negotiate and, thus, are not subject to limitation by a CBA. These latter statutes deal with protections the legislature believes are so necessary, so basic, that they should not be waived even through the collective bargaining process. These latter minimum standards, the state has concluded, are not to be used as "bargaining chips" in the give and take of negotiation.[21]

Some examples of California statutes which allow the parties to negotiate minimum standards are Labor Code § 204 which sets out the time periods within which wages must be paid (contains exceptions for workers covered by a CBA so as to allow the parties to negotiate different pay period arrangements); Labor Code § 227.3 which requires proration of vacation and forbids vacation policies which provide for a forfeiture of earned vacation pay is not effective in the event

[21]As examples, state-mandated minimum wages (8 C.C.R. § 11110 *et seq.*), exercise of political rights (Labor Code §§ 230, 1101) exercise of right to complain of safety violations (Labor Code §§ 6310, 6311).

the employment is covered by a CBA, and each of the California Industrial Welfare Commission Orders contain an exception to the stringent California overtime provisions if the worker is covered by a collective bargaining agreement that provides for a cash wage of at least $1.00 per hour in excess of the established state minimum wage and further provides for some premium rate for overtime hours.

The exception from the California daily overtime premiums contained in the Industrial Welfare Commissioner Orders is not unlike the maximum hours exception for workers employed under the terms of a CBA provided in the Fair Labor Standards Act at 29 U.S.C. § 203(*o*) (providing an exception to the "hours worked" definition) and § 207(b)(1) and (2) (carving out a limited exception to the overtime requirements)[22]. In carving out these limited exceptions to the overtime requirements of the FLSA, Congress has evidenced an understanding that workers covered by a CBA may not need the protections afforded to unrepresented employees. Congress has also evidenced a recognition of the fact that collective bargaining may, under some circumstances, waive "minimum standards" adopted by regulatory agencies. The prevailing rate of pay determined under the terms of the Service Contract Act may be negotiated by parties to collective bargaining agreements so long as the rate is at least the equivalent of the prevailing minimum wage adopted by Congress. (41 U.S.C. § 351(a)(1) and (2)). These exceptions illustrate the obvious conclusion that Congress did not envision

[22]Commissioner is aware of the language in *Metropolitan Life Insurance Co. v. Massachusetts, supra*, 471 U.S. at 755, which states: "Nor has Congress ever seen fit to exclude unionized workers and employers from laws establishing minimal employment standards." The provisions of 29 U.S.C. 207(b)(1)(2) provide, as do the provisions of Labor Code § 229, not for an exclusion, but for an option.

differentiation based on the fact that one is covered by a collective bargaining agreement as disparate treatment. More important, the exception evidences an intent by Congress that the parties to a collective bargaining agreement should be allowed to negotiate certain minimum standards when the statute provides the permission of the sovereign to do so.

D. *The Labor Commissioner Exercised Discretion Granted To The Agency Under State Law In Dismissing Livadas' Claim For Penalty Wages*

Judge Rymer's opinion in the Ninth Circuit correctly points out that the decision of the Labor Commissioner was based on the policy announced by the California courts which have considered the language of Labor Code § 229, *i.e.*, "not to enforce any claim that concerns the interpretation or application of any collective bargaining agreement containing an arbitration clause." The Ninth Circuit further recognized that the very language of the statute required the exercise of discretion by the Labor Commissioner. This exercise of discretion was, in fact, also mandated by the provisions of the California Labor Code which provides at Labor Code §98.3(a):

> "The Labor Commissioner may prosecute all actions for the collection of wages, penalties, and demands of persons who in the judgment of the Labor Commissioner are financially unable to employ counsel and *the Labor Commissioner believes* have claims which are *valid* and *enforceable*." (Emphasis added)

Judge Kozinski's dissent in the Ninth Circuit opinion recognizes that pursuant to the provisions of Labor Code § 98.3(a) the Labor Commissioner has "a good bit of discretion whether to press a particular employee's claim" and points out that § 98.3(a) provides that "it is the Commissioner who must

determine under what circumstances an employee is deemed financially unable to employ counsel."

Judge Kozinski further recognizes that under §98.3(a):

> "The Commissioner must also resolve an important question of state law: Does the employee have a valid claim?"

Judge Kozinski then concludes that:

> "Had the Commissioner refused to enforce[23] Livadas' claim for either of these reasons, this would have been purely a matter of state law and not the proper subject of a federal action."

The Commissioner submits that Judge Kozinski's analysis is correct as far as it goes; the problem is: Judge Kozinski failed to consider all of the discretionary findings required by the state law. The "important question[s] of state law" which Judge Kozinski refers to are the issues which are addressed to the sole discretion of the Labor Commissioner by the provisions of the Labor Code §98.3(a). The analysis under that section must include not only the question of whether the Labor Commissioner considered whether the claim was *valid*, but also whether the claim was *enforceable*.

The Commissioner refused to enforce the Livadas claim because in his "judgment", based on state law (Labor Code §§

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[23]The "enforcement" of the Livadas claim has been the concern of both Judge Henderson in the District court and Judge Kozinski in his dissent. While it is possible that Livadas' claim (had it been processed) could have been "enforced" by the filing of an action under Labor Code §98.3(a), it is much more likely that the adjudication process provided in Labor Code § 98(a) would have been followed. It would not have mattered, however, which method was used, the Labor Commissioner, either through the assigned Deputy (J. Aceves in this particular case) or a Division Hearing Officer applying the Division policy as dictated by the California courts, would have reached the same conclusion.

98.3(a) and 229), the claim was unenforceable because it required the interpretation and/or application of the collective bargaining agreement. Judge Kozinski's analysis reaches an incorrect result because the analysis does not discuss this overriding issue.

E. *Public Policy Compels The Conclusion That The States Should Be Left Free To Design Remedies Which Give A Wide Berth To Drawing The Fine Line Between State And Federal Power*

While there is no evidence that the California Legislature intended the provisions of Labor Code § 229 to present a bulwark behind which the state's agencies and courts could hide to escape the necessity of drawing fine lines between federal and state power, it must be admitted that the statute does have that effect.

There appears to be little doubt that this Court recognizes that the determination of the fine line between state power and federal power for preemption purposes is a difficult one to draw. Justice O'Connor, after tracing the history of the issue, noted in the recent case of *New York v. United States*, ___ U.S. ____, 112 S.Ct. 2408, 2417 (1992):

> "...the task of ascertaining the constitutional line between federal and state power has given rise to many of the Court's most difficult and celebrated cases. At least as far back as *Martin v. Hunter's Lessee*, 1 Wheat. 304, 324, 4 L.Ed. 97 (1816), the Court has resolved questions 'of great importance and delicacy' in determining whether particular sovereign powers have been granted by the Constitution to the Federal Government or have been retained by the States." (Emphasis added)

Judge Rymer, writing for the majority in the Circuit court,

foresaw the pragmatic results of a holding which required that the California State Labor Commissioner would be called upon to make these most difficult decisions on a day-to-day basis. The Ninth Circuit opinion stated that it was the belief of the majority that:

> "Congress would not want state officials erring on the side of adjudicating state law disputes whenever it is a close call as to whether a claim is preempted. If anything, Congress would presumably want state officials to defer to arbitration and adjudication under the federal scheme if a claim even arguably is intertwined with consideration of a collective bargaining agreement containing an arbitration clause." (Pet. 14a)

This rationale reiterates the declaration of this Court in *United Steelworkers v. Warrior & Gulf, supra*, that arbitration will not be denied "unless it may be said with positive assurance that the arbitration clause is not susceptible of an interpretation that covers the asserted dispute." *Id.*, at 582-583.

Judge Kozinski, writing in dissent, attacks this position as "a novel doctrine of quasi-preemption." Judge Kozinski's dissatisfaction with the majority's position in this regard, leads him to state that the role of the court is to "apply the laws Congress has written, not to guess what Congress 'presumably' would have wanted as to matters about which it did not legislate." (Pet. 18a) The Labor Commissioner submits that again, Judge Kozinski's analysis is incomplete; again, he fails to consider all of the issues.

Judge Kozinski's argument ostensibly begins with the premise that Congress did not specifically address the question of whether the states may adopt a law which provides that its courts should give a wide berth to questions of federal and state power. From this premise Judge Kozinski concludes that

the court has no right to conclude that in the event Congress had addressed the subject, Congress would have, in view of the primacy of the federal scheme for handling labor disputes, concluded that state officials should give wide latitude to adjudicating such disputes. What is not clear from Judge Kozinski's analysis is who, if not the courts, is to determine what Congress intended in this regard?

It is clearly the role of the judiciary to explain the intent (either explicit or implied) of the legislature. This intent must consider the basic intent of the statutory scheme coupled with the available caselaw. The conclusion of the majority that Congress would not have wanted state officials dealing in this area is supported by both the law and logic. It should follow, then, that a state law which, for whatever reason, requires state officials to defer to arbitration and adjudication under the federal scheme is consistent with the federal law (See *N.L.R.B. v. City Disposal Systems, Inc.*, 465 U.S. 822, 838-839 (1983). This should be especially true where, as here, the CBA (See § 18.1) provides that the very question of the arbitrability of a dispute must be left to the arbitrator. (J.A. 11) Such a policy is not "a novel doctrine of quasi-preemption" but an enlightened doctrine of "quasi-abstention."

1. *Absent A Bright Line Test Regarding The Fine Line Between State And Federal Power There Will Be Increased Federal Review Of State Agency Decisions*

Unless this Court is able to formulate a bright line test regarding the distinction between which issues contained in a wage claim would be so intertwined with consideration of a collective bargaining agreement that federal policy would dictate preemption and which issues the state officials may apply, under federal labor law standards, in adjudicating the

complaint, the state agency's discretionary decisions will be the subject of actions for violation of the civil rights of either the employer or the employee. It is respectfully submitted, however, that such a bright line test is impossible to formulate. As Justice O'Connor noted in *New York v. United States, supra*, resolution of such questions of "great importance and delicacy" have led to some of the Court's "most difficult and celebrated" cases.

The Labor Commissioner's decisions regarding these important and delicate issues would, according to the District court, subject the Commissioner to review by the Federal judiciary on a case-by-case basis. An incorrect decision by the Commissioner in regard to these issues would subject the state to payment of attorney's fees pursuant to 42 U.S.C. § 1983.

Judge Rymer's decision obliquely addresses this obvious result and fashions a remedy which responds to the requirements of a federalist system. The Ninth Circuit correctly places the requirement for review of a state agency's decision which is based on an application of the state law, squarely where it should be: On the state courts.

The District court and Judge Kozinski in dissent both contend that the facts in this case do not require the interpretation of the collective bargaining agreement and that since the federal law would permit, pursuant to the language found in footnote 12 of the *Lingle* case, the application of the wage rate in the CBA, the Labor Commissioner has erred in refusing to prosecute Livadas' claim. For the reasons set out above, we, of course, disagree. But, assuming *arguendo*, that this Court were to agree with that assessment of the facts in this particular case, what of the next case?

The Commissioner submits that there is no bright line test that can be developed to be applied by state courts and

agencies which will discern the limits of federal and state power. Suppose, for example, that another worker employed by Safeway Stores under the terms of the CBA in question here files a claim. In this claim the Labor Commissioner is confronted with allegations that while the employee received some wages at the time of discharge, the amount received does not represent the full sum owed. Those allegations would state a valid claim for penalty wages pursuant to Labor Code § 203[24]. Suppose further that the underpaid sums which the employee alleges are due consist of vacation wages. It would clearly be necessary that the Labor Commissioner review the collective bargaining agreement and interpret and apply the terms of the agreement. Initially, it would be necessary to determine if there was an agreement to pay vacation wages and a perusal of the CBA would lead the Deputy Labor Commissioner to Section 11 of the contract. (J.A. 10) Then it would be necessary to apply that agreement to the controversy. Inasmuch as the provisions of California Labor Code §227.3 do not apply to collective bargaining agreements it would become necessary for the Deputy Labor Commissioner to apply "federal" common law contract theories to interpret the meaning of the vacation pay sections.

F. *The Facts In This Case Require Interpretation Of The CBA And Even Under Federal Preemption Principles Livadas' Claim May Not Be Maintained*

The Commissioner contends that the state should be free to apply state jurisdictional and procedural statutes in

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[24]Labor Code § 201 provides that the wages earned and unpaid at the time of discharge must be paid at that time. Section 203 states that the penalty is applicable if an employer willfully fails to pay, "without abatement or reduction" any wages of an employee who is discharged.

enforcing state law. The federal preemption principles are designed to establish limits on state jurisdiction vis-á-vis federal jurisdiction—not as procedural rules which the state must follow in establishing its internal jurisdictional limits. However, even if this Court were to find that it is necessary for a state to utilize federal preemption principles designed to limit actions which, arguably, arise under § 301 to determine the right of a party to bring an action to enforce a state-law remedy, Livadas' claim must fail.

In this case, in order to establish if Livadas received all the pay to which she was entitled, it would be necessary to establish whether the provisions of § 3.2 of the CBA (J.A. 2) apply in order to determine if Livadas received three days' notice of her termination. In the event three days' notice was not received, Livadas would be entitled to recover an additional three days' pay. Of course, if the discharge was for cause the three days' pay is not owed. Thus, if the employer raised the defense that the discharge was for cause, then the Labor Commissioner would have to determine if the discharge was for cause.

Since the penalty imposed by Labor Code § 203 is to reflect the workers' wage continuing "at the same rate," it is obviously necessary to establish what the "same rate" was. As the facts establish, Livadas herself gave two conflicting statements as to the correct hourly wage and neither of the statements can be correct according to the application of ordinary mathematics. (See fn. 2, *supra*) Livadas can be excused for this error, however. There are, in fact, eight separate wage rates covering separate classifications. Each of these classifications have detailed contractual definitions of their duties. Together with these separate wage rates are provisions for bonuses, shift differentials and night premiums which must be considered in determining the hourly rate of pay. It is

entirely conceivable that Livadas, herself, did not know what her hourly rate was at any given time.

Since the § 203 penalty is to continue at a daily rate, it will be necessary to establish the number of hours in a day which Livadas was scheduled to work. If she was a full-time employee she would be entitled to eight hours per day (J.A. 5, 9) unless, of course, the parties had agreed to a workweek of four ten hour days. (J.A. 5) On the other hand, if Livadas was a part-time employee, her hours would be subject to the provisions of § 4.10 of the CBA. (J.A. 4) If the final workweek included a holiday, the calculation is further complicated for part-time employees. (J.A. 4)

Suffice to say that the penalty wage due under § 203 can not be established simply by reference to a calendar as suggested by the dissent in the Ninth Circuit. A perusal of the CBA will illustrate the difficulties a Hearing Officer would encounter in simply establishing the proper penalty to apply if it could first be established that the failure to pay was "willful".

G. *42 U.S.C. § 1983 Should Be Unavailable As A Remedy When A State Official Simply Fails To Discern The Limits Of Federal And State Powers*

Livadas should not be allowed to maintain a § 1983 action against the Commissioner as a result of a recent line of decisions by this Court precluding such claims against state officials who exercise their decision-making discretion yet fail to discern the limits of that discretion because an obligation imposed on them by federal law is unclear.

Justice Kennedy, writing for the dissent in *Golden State I* noted that "[t]he Court should not interpret 1983 to give a cause of action for damages when the only wrong committed

by the State or its local entities is misapprehending the precise location of the boundaries between the state and federal power." *Golden State Transit Corp. v. City of L.A.*, 493 U.S. 103, 114 (Kennedy, J., dissenting) (1989). Section 1983 is not the appropriate remedy to redress a deprivation of an individual right when the correlative duty imposed by federal law on the official is vague, ambiguous or indefinite. "[T]he availability of the 1983 remedy turns on whether the statute, by its terms or as interpreted, creates obligations 'sufficiently specific and definite' to be within the competence of the judiciary to enforce." *Id.* at 108 (citing *Wright v. City of Roanoke Redev. & Hous. Auth.*, 479 U.S. 418, 432 (1987).

1. *A 1983 Action May Be Maintained Only When A Federal Law Has Provided Specific Guidelines Imposing Binding Obligations On State Officials Clearly Narrowing The Discretion To Be Exercised*

The seminal decision by this Court establishing the rule that a 1983 suit is not maintainable when federal law does not explicitly and unambiguously limit the discretion that a state official might otherwise exercise is *Pennhurst State Sch. & Hosp. v. Haldeman*, 451 U.S. 1 (1981). The issue in *Pennhurst* was whether a mentally retarded person could bring a § 1983 suit against health officials because the Developmentally Disabled Assistance Act purportedly imposed an obligation on them to not dispense federal funds to institutions failing to provide "appropriate treatment in the least restrictive environment " to retarded persons. *Id.* at 17.

The *Pennhurst* Court held that as the purpose of the Act was only to "encourage, rather than mandate" better treatment of retarded persons, *Id.* at 20, no duty was imposed on health officials to ascertain before dispensing federal funds

whether an institution provided "the least restrictive treatment possible." *Id.* at 9. The Court concluded that the Act did not place an obligation on officials to "fund [only] certain levels of treatment," *Id.* at 20, because it "eschewed creating any specific guidelines." *Id.* at 56 (White, J., in a separate concurring opinion). Therefore, the Act failed to expressly limit the discretion wielded by health officials in disbursing funds to mental institutions and did not create a § 1983 cause of action.

Similarly, in the instant case, the NLRA does not provide "specific guidelines" for the Commissioner to determine whether federal law supplants a state law which prohibits him from representing a claimant employed under a collective bargaining agreement in a wage termination dispute. There certainly is no explicit directive under the NLRA that imposes a "binding obligation" on the Commissioner to contravene California law and represent such a claimant. *Wilder v. Va. Hosp. Ass'n.*, 496 U.S. 512 (1990). Therefore, no federal law expressly and unambiguously restricts the Commissioner's discretion to comply with California law and not pursue Livadas' claim. Consequently, a 1983 suit against the Commissioner by Livadas is not a viable remedy.

Following *Pennhurst* the subsequent decision by this Court in *Wright v. City of Roanoke Redev. & Hous. Auth, supra,* held that a 1983 suit was a viable remedy against state officials because the federal statute imposed "specific and definable" obligations on the officials and circumscribed the discretionary authority they otherwise would have wielded. *Wright, supra,* 479 U.S. at 430. In *Wright* the Court held that tenants in low-income housing projects could maintain a 1983 action against housing officials who overbilled utilities and violated the rent ceiling provision of the Brooke Amendment to the Housing Act. The Court concluded that the provision entitling tenants to a "reasonable allowance for utilities" was not "vague and amorphous" but rather "specifically set out guidelines that [housing officials] were to follow in establishing utility allowances." *Id.* at 430. By adding a surcharge for excess utility use, housing officials acted outside their discretion and did not heed their obligation to make sure that tenants "pay only the prescribed maximum portion of their income as rent." *Id.* at 422. This dereliction of duty constituted a failure to act within precise discretionary contours shaped by federal law and enabled tenants "to bring [a 1983] suit in federal court to challenge [the] housing authorities' calculations of utility allowances." *Id.* at 426. The clearly defined obligations which limited the discretion housing officials could exercise in setting utility rates for public housing tenants contrasts with the lack of any clear federal directive restricting the Commissioner's discretion to conform with federal caselaw in pursuing a wage termination penalty claim by an employee who worked under a collective bargaining agreement.

Another case which arose subsequent to *Pennhurst* was *Wilder v. Va. Hosp. Ass'n., supra,* which raised the issue of whether health providers could bring a § 1983 suit against medical services officials for failing to adopt "reasonable and adequate" reimbursement rates. The *Wilder* Court held that although the federal law gave officials "flexibility" in setting rates, there were "factors which [officials] must consider in adopting its rates." *Id.* at 519. The Court concluded that these factors were an "objective benchmark" which let officials act with "discretion in choosing among reasonable methods of calculating rates" and gave courts a standard for "review[ing] whether the rates comply with the amendment." *Id.* at 520. Thus because the federal law identified a "range of reasonable rates," officials who set "rates outside that

range" acted outside their discretion and were thus subject to a § 1983 action.

By contrast, in the instant case, no "objective benchmark" is identified in the NLRA to inform the Commissioner that he is without discretion to refuse to represent Livadas in her penalty action against Safeway because federal labor law preempts such discretion. Indeed, if the state is required to utilize the tangled web of § 301 preemption principles each case would raise the threat of federal court review and possible damages under § 1983.

The most recent decision by this Court reaffirming the rule that a § 1983 suit is not maintainable when the federal statute does not provide "unambiguous notice" to a state official that a duty imposed by federal law curtails his discretion is *Suter v. Artist M.*, ___ U.S. ____, 112 S.Ct. 1360, 1366 (1992). The *Suter* Court held that a clause in the Adoption Assistance and Child Welfare Act requiring family services officials to use "reasonable efforts" to maintain and reunify families did not provide "unambiguous notice" that failure to use such efforts could result in a § 1983 cause of action. *Id.*, 112 S.Ct. at 1368. The Court stated that because no "statutory guidance [was] found as to how 'reasonable efforts' [were] to be measured" state officials could "comply with this directive, and with the other provisions of the Act, within broad limits." *Id.* Therefore, the Court concluded that the "'reasonable efforts' language [did] not confer an enforceable right upon the Act's beneficiaries" because the correlative duty imposed on the family services officials was too "generalized" to limit the officials' discretion. *Id.*, 112 S.Ct. at 1370.

Each of the above cited cases have involved Congress' spending power; a Constitutional issue which, of course, is not raised in the present case. However, the rationale for the rule

remains: absent a clear mandate to take definable action, the state official *must* exercise discretion in deciding whether state or federal law is applicable. While there is no argument that in cases involving the National Labor Relations Act the states are precluded from enforcing any state law which would directly interfere with the rights guaranteed by the Act, what is not nearly so clear is when does the right of a state to enforce its own law, derived from a valid exercise of its police power, directly interfere with the right of the parties to negotiate a collective bargaining agreement.

As this Court has recently noted, "the task of ascertaining the constitutional line between federal and state power has given rise to many of the Court's most difficult and celebrated cases" raising "questions of intricacy and nicety...in determining whether particular sovereign powers have been granted by the Constitution to the Federal Government or have been retained by the States." *New York v. United States, supra*, ___ U.S. ____, 112 S.Ct. 2408 at 2417. Certainly, resolution of this amorphous issue with which even this Court has struggled should not subject state officials to actions alleging violations of civil rights.

III. CONCLUSION

The State of California has adopted a law which provides protection to its workers against over-reaching employers who would require that the contract of employment contain an arbitration clause which would preclude those workers from bringing actions to enforce the provisions of the California law dealing with time, place and manner of wage payment.

In adopting this minimum standard, the legislature, in view of the state's long-established public policy encouraging arbitration, chose to limit the right to bring independent

actions for enforcement of these wage laws only to those employees who, in the view of the legislature, were most in need of that protection. The legislature determined that those workers who collectively bargained with their employer did not need the protections afforded by § 229 and should be left in the same position as all other citizens of the state who are parties to contracts containing arbitration agreements.

The exception from the minimum standards of § 229 arises in situations where the worker is covered by a CBA with an arbitration clause and the claim requires either the interpretation or the application of the CBA. This exception facilitates two public policies of the state of California: the public policy which encourages arbitration and the announced policy of the state contained at Labor Code § 923 which encourages collective bargaining.

Respectfully submitted,

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APPENDIX

APPENDIX A

California Labor Code Sections/Regulations

Labor Code § 201: If an employer discharges an employee, the wages earned and unpaid at the time of discharge are due and payable immediately. An employer who lays off a group of employees by reason of the termination of seasonal employment in the curing, canning, or drying of any variety of perishable fruit, fish or vegetables, shall be deemed to have made immediate payment when the wages of said employees are paid within such reasonable time as may be necessary for computation and payment thereof...

(Note that sections 201.5 and 201.7 provide further exceptions to the immediate payment requirement for employees engaged in the motion picture and oil drilling industries).

Labor Code § 203: If an employer willfully fails to pay, without abatement or reduction, in accordance with Sections 201, 201.5, and 202, any wages of an employee who is discharged or who quits, the wages of such employee shall continue as a penalty from the due date thereof at the same rate until paid or until an action therefor is commenced; but such wages shall not continue for more than 30 days. No employee who secretes or absents himself to avoid payment to him, or who refuses to receive payment when fully tendered to him, including any penalty then accrued under this section, shall be entitled to any benefit under this section for the time during which he so avoids payment.

Suit may be filed for such penalties at any time before the expiration of the statute of limitations on an action for the wages from which the penalties arise.

Labor Code § 204: All wages, other than those mentioned in Section 201, 202, 204.1, or 204.2, earned by any person in any employment are due and payable twice during each calendar month, on days designated in advance by the employer as the regular paydays...However, when employees are covered by a collective bargaining agreement that provides different pay arrangement, those arrangements shall apply to the covered employees.

Labor Code § 227.3: Unless otherwise provided by a collective bargaining agreement, whenever a contract of employment or employer policy provides for paid vacations, and an employee is terminated without having taken off his vested vacation time, all vested vacation shall be paid to him as wages at his final rate in accordance with such contract of employment or employer policy respecting eligibility or time served; provided, however, that an employment contract or employer policy shall not provide for forfeiture of vested vacation time upon termination. The Labor Commissioner or a designated representative, in the resolution of any dispute with regard to vested vacation time, shall apply the principles of equity and fairness.

Labor Code § 229: Actions to enforce the provisions of this article for the collection of due and unpaid wages claimed by an individual may be maintained without regard to the existence of any private agreement to arbitrate. This section shall not apply to claims involving any dispute concerning the interpretation or application of any collective bargaining agreement containing such an arbitration agreement.

Labor Code § 750: The period of employment shall not exceed eight hours within any 24 hours and the hours of employment shall be consecutive, excluding intermissions for meals, for all persons who are employed or engaged in work in:

(a) Underground mines or underground workings.

(b) Smelters and plants for the reduction or refining of ores or metals.

Labor Code § 750.5: The provisions of Section 750 shall not prohibit a period of employment up to 12 hours within a 24-hour period when the employer and a labor organization representing employees of the employer have entered into a valid collective bargaining agreement where the agreement expressly provides for the wages, hours or work, and working conditions of the employees.

Labor Code § 923: ...[t]he public policy of this State is declared as follows:

Negotiations of terms and conditions of labor should result from voluntary agreement between employer and employees. Governmental authority has permitted and encouraged employers to organize in the corporate and other forms of capital control. In dealing with such employers, the individual unorganized worker is helpless to exercise actual liberty of contract and to protect his freedom of labor, and thereby to obtain acceptable terms and conditions of employment. Therefore it is necessary that the individual workman have full freedom of association, self-organization, and designation of representatives of his own choosing, to negotiate the terms and conditions of his employment, and that he shall be free from the interference, restraint, or coercion of employers of labor...in the designation of such representative or in self-organization or in other concerted activities for the purpose of collective bargaining...

Labor Code § 3201.5: [For purposes of complying with the workers' compensation provisions of the Labor Code]... the Department of Industrial Relations and the courts of this state shall recognize as valid and binding any provision in a collective bargaining agreement between a private employer or groups of employers in the construction, construction maintenance, and related activities and a recognized or certified exclusive bargaining representative that establishes...

(1) An alternative dispute resolution system governing disputes between employees and employers or their insurers that supplements or replaces all or part of [the workers' compensation dispute resolution procedures] ...Any system of arbitration shall provide that the decision of the arbiter or board of arbitration is subject to review by the [Workers' Compensation] appeals board in the same manner as provided [for any other workers' compensation claim].

California Industrial Welfare Commission Orders Regulating Wages, Hours and Working Conditions In The Mercantile Industry (Title 8, Calif. Admin. Code, § 11070, provide overtime protections to California workers employed in the retail food industry). § 11070(3) generally provides for premium rates for hours in excess of eight in any one day or forty in any one week. Subdivision (H) provides:

Except as provided in subsections (D), (E) [which deal with employment of minors] and (G) [dealing with eating facilities for employees], this section shall not apply to any employee covered by a collective bargaining agreement if said agreement provides premium wage rates for overtime work and a cash wage rate for such employee of not less than one dollar ($1.00) per hour more than the minimum wage.